Nos. 20-3663, 20-3665

United States Court of Appeals
for the
Eighth Circuit

JOHN S. HAHN,
Special Master,
BADER FARMS, INC.,
Plaintiff-Appellee,
BILL BADER,
Plaintiff,
vs.
MONSANTO COMPANY,
Defendant-Appellant,
BASF CORPORATION,
Defendant-Appellant.

On Appeal from the Unites States District Court
for the Eastern District of Missouri, No. 1:16-cv-00299-SNLJ
The Honorable Stephen N. Limbaugh, Jr., District Judge

PLAINTIFF-APPELLEE BADER FARMS, INC.'S ANSWER BRIEF IN NOS. 20-3663, 20-3665

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SUMMARY OF THE CASE

Monsanto and BASF negligently commercialized their dicamba-tolerant ("Xtend") crop system knowing farmers would spray deadly, off-label dicamba in 2015-2016 and even "lower-volatility" dicamba would cause massive off-target injury in 2017-present. Defendants did so "with the expectation" this damage to farmers would help them sell more product. As a result, Bader Farms' peach orchards were (and are) pummeled each year with dicamba sprayed over Xtend crops, costing millions in lost profits and rendering the peach operations unsustainable.

After a three-week trial, Plaintiff submitted negligent design and failure to warn claims. The jury, correctly instructed with Missouri Approved Instructions, awarded Plaintiff $15 million in compensatory and $250 million in punitive damages and found Defendants acted in a joint venture and conspiracy. In an 88-page, post-trial order, the District Court rejected Defendants' arguments raised on appeal (reducing only punitive damages to $60 million).

Thirty minutes per side is adequate argument given the District Court's exhaustive analysis. Plaintiff requests equal time to Defendants' combined allotment because they appeal the same issues but divide responsibility for the arguments.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eighth Circuit Local Rule 26.1A, Plaintiff-Appellee Bader Farms, Inc. ("Bader Farms"), a non-governmental entity, states that Bader Farms has no parent company, no subsidiary that is not wholly owned, and no publicly held company owns 10 percent or more of its stock.

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STATEMENT OF THE CASE

Until 2015, Bader Farms was Missouri's largest peach producer, generating millions of dollars in annual sales, supplying grocers in eight states. DEFSAppx-653; PLAppx-134-135. That forever changed when Defendants commercialized their dicamba-tolerant system.

1. Dicamba.

Dicamba is a deadly, volatile herbicide, historically used in pastures and cereal crops during colder-weather months when sensitive vegetation is not growing. DEFSAppx-499-502.

Before Defendants' dicamba-tolerant system, dicamba use in Missouri's Bootheel was minimal because it has little pasture or corn but grows a lot of dicamba-sensitive soybean and cotton (the dominant crops surrounding Bader Farms). DEFSAppx-503; PLAppx-220. Dicamba was not used as a standalone, foundational herbicide. DEFSAppx-514-515. Off-target dicamba complaints were virtually nonexistent. DEFSAppx-503-504.

2. Defendants Jointly Created A Dicamba-Tolerant System.

Monsanto owns the dicamba-tolerant seed trait. PLAppx-279. BASF owns the dicamba-herbicide molecule. PLAppx-383-387. Together, they

developed and commercialized a dicamba-tolerant crop system. BASF told EPA:

> BASF and Monsanto Corporations ***are engaged in a joint venture*** … Together the companies have combined their expertise in crop and dicamba herbicide technologies ***to bring about an effective foolproof system*** for growing soybeans and cotton.

PLAppx-355-356 (emphasis supplied).

Defendants entered numerous agreements, spanning over a decade, regarding their dicamba-tolerant system. DEFSAppx-1247-1293, 1312-1378; PLAppx-265, 373-377. They created joint development, regulatory, and commercialization work groups, with equal vote and governance. DEFSAppx-738-739; PLAppx-270-271, 293-299.

Defendants' dicamba-tolerant system allowed never-before-possible, over-the-top dicamba spraying on soy and cotton crops in warm, summer months—use that previously would have killed the crops. PLAppx-17, 39-40. Xtend technology exponentially increased the scope and scale of dicamba use in Southeast Missouri. DEFSAppx-513-516.

3. Defendants Ignored Warnings Against A Dicamba-Tolerant System.

Employees, industry stakeholders, and academics warned Defendants against commercializing a dicamba-tolerant system. Monsanto's regulatory employee cautioned Monsanto would be "defending dicamba" in courts due

to "drift and volatilization to nearby crops." PLAppx-337-338. Monsanto's Dicamba Advisory Council ("DAC"), which BASF participated in, warned, "The economic damage could be significant," "which could force sensitive crop growers to quit growing sensitive crops if the damage/potential was severe enough." PLAppx-19-22. DAC member, Steve Smith of Red Gold Tomatoes, repeatedly warned a dicamba-tolerant system was "the most serious threat to specialty crops of anything [he] had seen during [his] time working with specialty crops." PLAppx-6-7. Monsanto removed him from the DAC and told members he "resigned." PLAppx-8-11. Academics warned: "DON'T DO IT; Expect lawsuits." PLAppx-335.

4. Monsanto Concealed Dicamba Dangers.

Monsanto blocked academic volatility testing to avoid bad results and "keep a clean slate" with EPA. PLAppx-15-16, 89-93, 332. Monsanto prohibited employees from spraying dicamba, pulled all field tests in 2015 to avoid off-target-injury "baggage," and only performed small-plot tests because "that eliminates some of the risk of off-target movement." PLAppx-91-95, 332-334.

Monsanto actively concealed dicamba dangers:

> Dicamba is under a great degree of scrutiny by the EPA right now… As such, top management in Regulatory and Legal have taken steps to prevent off-site movement of dicamba while the

> EPA is reviewing our data submissions. This includes a moratorium on testing our lead formulations(.)

PLAppx-336.

Monsanto asked BASF to limit academic testing to avoid "results that could negatively impact EPA's registration decision." PLAppx-121-122, 382.

5. Defendants Knew Farmers Would Spray Off-Label.

In 2015, after EPA refused to register BASF's Clarity (older, already-on-the-market dicamba) for use over Xtend crops due to safety concerns, Monsanto launched an incomplete dicamba-tolerant system, with no approved dicamba, knowing farmers would spray off-label. PLAppx-85, 120, 381; DEFSAppx-248-249

In its launch-decision meeting, Monsanto analyzed the risks: On a slide entitled "Reconfirm Support to Launch without Dicamba Label," the "Risks" included "Growers make off-label applications of dicamba." PLAppx-42-43; DEFSAppx1220-1222. Monsanto acknowledged "Grower[s] are expecting ability to use dicamba" and, in red lettering, "50% indicate intent to use OTT." DEFSAppx1224. Monsanto launched anyway. PLAppx-84.

Launch-meeting participants mocked Monsanto's recklessness, calling themselves "renegades that launch a technology without a label and think[] one sticker is going to keep us out of jail." PLAppx-343. Monsanto knew its

"pink sticker" was worthless because it omitted the dangers of over-the-top dicamba and off-target injury. PLAppx-12-13.

As expected, off-label-dicamba use was pervasive: BASF told Monsanto it was "widespread" in 2015 and "will be rampant in 2016." PLAppx-44-45, 312; DEFSAppx-246-247, 249. Monsanto did nothing to evaluate off-label use in 2015 or to prevent its recurrence in 2016. PLAppx-46-47; DEFSAppx-253, 258.

6. Defendants Adopted "Defensive Planting" Sales Strategies.

Defendants counted on damage from off-label spraying to drive sales ("defensive planting"). Monsanto developed a "Protection from your neighbor" strategy to convince disinterested farmers to buy Xtend seed. PLAppx-32-37, 305.

BASF expected off-label spraying but chose to "get behind" the system and promote Xtend seed, as it was important to BASF's bottom line. PLAppx-363-364. In 2015, BASF "scaled up" Clarity production knowing Xtend growers would be "tempted to use dicamba illegally." PLAppx-384, 387. Clarity sales spiked, from approximately $60 million to $100 million in 2016, due to "increased demand" from the Xtend-seed launch. PLAppx-116-118, 391-393.

BASF's "Strategic Update" listed "Defensive Planting" as its "Potential Market Opportunity." PLAppx-353-354. Publicly, BASF denied considering "defensive planting" in its sales strategies. PLAppx-350-351.

Internally, Monsanto circulated "interesting market research," reporting "defensive planting" drove "rapid adoption" of Xtend seed in 2016. PLAppx-78-79, 326-329.

7. Monsanto Refused To Enforce Its Grower License To Prevent Off-Label Spraying.

Every Xtend-seed grower must have a license from Monsanto and agree to technology use terms ("TUG"). PLAppx-67. Monsanto writes the TUG, controlling how growers use its products. *Id.* Monsanto can refuse to sell to growers or revoke their licenses for violating the TUG—something Monsanto does when necessary to protect its own profitability. DEFSAppx-267-268.

Monsanto refused to pull licenses from Xtend growers who sprayed off-label dicamba because such enforcement would hurt its sales. PLAppx-23-31, 300-301. Monsanto took no action to stop off-label spraying, no matter how egregious the violation. DEFSAppx-346.

8. Defendants Turned A Blind Eye, And A Dicamba Bomb Exploded.

a. Monsanto Ignored Off-Label Spraying And Damage Reports.

Monsanto's policy was to not investigate off-label-dicamba use or damage in 2015-2016. DEFSAppx-250; PLAppx-85. Monsanto knew Bootheel-area farmers were spraying off-label dicamba over Xtend crops in 2015 and 2016 and observed off-target damage; however, Monsanto did nothing following 2015 to avoid a 2016 recurrence. PLAppx-99-103.

Consequently, in July 2016, BASF reported:

> The one thing most acres of beans have in common is dicamba damage. **There must be a huge cloud of dicamba blanketing the Missouri Bootheel. That ticking time bomb finally exploded! The scope of the damage is on a massive scale**…

PLAppx-394 (emphasis supplied).

That month, Monsanto learned of 115 off-target-dicamba complaints in the Bootheel. DEFSAppx-265-266; PLAppx-50, 348-349. Rather than investigate or assist injured farmers, Monsanto sent one of its seed growers to extol Xtend at an open forum. PLAppx-50-55. Monsanto learned four large growers were primary sources of off-target damage in the Bootheel but did nothing. PLAppx-55-58.

In August 2016, EPA issued a Compliance Advisory entitled "High Number of Complaints Related to Alleged Misuse of Dicamba Raises Concerns." PLAppx-60, 314-315. Monsanto learned: "To date the Missouri Department of Agriculture has received approximately 117 complaints

alleging misuse of pesticide products containing dicamba." PLAppx-59-60, 314-315. Missouri's crop damage estimates topped 42,000 acres. PLAppx-61-62, 314-315.

Monsanto still did not investigate or take any remedial measures. PLAppx-62-63. When Bill Bader implored Monsanto to investigate dicamba damage ravaging Bader Farms' orchards in 2015 and 2016, Monsanto refused. PLAppx-83.

b. Monsanto Denied Responsibility And Deflected Blame.

Instead of helping farmers, Monsanto decided to "get on this right now!" and "deny! Deny! DENY!" dicamba volatility. PLAppx-341. Monsanto decided it would not settle off-target claims. PLAppx-85-86. Instead, Monsanto more than doubled its claims-management budget, anticipating increased damage in 2017. DEFSAppx-273, 275; PLAppx-322. Monsanto focused its efforts on "defense of commercial offsite movement claims." PLAppx-75-77, 316.

Monsanto employees discussed Bootheel dicamba damage and planned to blame disease. PLAppx-80-81, 306. Before ever visiting/inspecting Bader Farms' orchards, Monsanto's disease defense was formulated.

9. Defendants' Completed System Improved Nothing, Defendants Blamed Farmers.

In 2017, Defendants launched their complete system with purportedly "lower-volatility" dicamba (XtendiMax and Engenia), but damage complaints skyrocketed—each receiving 3,000+ dicamba complaints. PLAppx-48-49, 263.

Dr. Kevin Bradley, University of Missouri-Columbia, compiled data reporting 3.6 million damaged soybean acres in 2017, including 335 complaints in Missouri, 24 in Dunklin County (Bader Farms' home). DEFSAppx-535; PLAppx-402-407.

Instead of helping farmers, Defendants implemented strategies to blame them and not settle claims. PLAppx-73-74, 106-111, 324-325, 365-369. Defendants' Alliance Management Team ("AMT") coordinated their joint defense of claims. PLAppx-276, 361-362.

10. Bader Farms' Orchards Are Unsustainable In A Sea Of Dicamba.

Bader Farms has been devastated by dicamba sprayed over Xtend crops from 2015-present. PLAppx-55-58, 99-101, 160-162, 166-168, 171-172, 221-225, 229, 245, 248-250; DEFSAppx-364-368, 373, 526-529, 533, 542-543, 597, 600-601, 617, 623-624, 626.

Sales records, product-use maps, and witness testimony confirm Defendants' dicamba-tolerant system (complete and incomplete) was used

by farmers surrounding Bader Farms, from 2015-present. *Id.*, DEFSAppx-366-368, 373, 526-529, 537, 542-43; PLAppx-398-401.

Dr. Ford Baldwin, Plaintiff's expert, testified the orchards' rapid productivity decline resulted from multiple exposures to dicamba sprayed over Xtend crops, multiple years, weakening the trees and rendering the orchards unsustainable. PLAppx-220, 246, 398-407; DEFSAppx-525, 625-26. Dr. Baldwin's conclusions are based on 45+ years of scientific knowledge, training, and experience diagnosing herbicide injury; five inspections of Bader Farms; four years observing dicamba's effects in Southeast Missouri and Northeast Arkansas; and Dr. Bradley's data regarding same. PLAppx-218, 221, 226, 402-407; DEFSAppx-496, 531, 533, 535, 543.

Dr. Baldwin ruled out other causes—including disease and weather events Bader Farms tolerated successfully before Xtend. PLAppx-230-231, 244-245; DEFSAppx-618-623. He did not test for dicamba because, as BASF states, "you cannot detect [dicamba] at these rates. It's pointless." PLAppx-228-229.

Since Xtend's release, dicamba has been increasingly sprayed over vast acres of Xtend crops, during hot summer months, loading the atmosphere, and causing landscape damage. DEFSAppx-536-539, 541; PLAppx-224-225,

227, 240-241. Bader Farms' damage worsened each year Defendants' system spread, placing the orchards in a sea of dicamba. PLAppx-398-401. Without this novel dicamba use, Bader Farms' damage would not have occurred. DEFSAppx-514-516, 625-626; PLAppx-230-231, 245-246, 248-249.

Bader Farms' orchards succumbed to repeated exposure to dicamba sprayed overtop Xtend crops. PLAppx-220, 229; DEFSAppx-558-559. Costly attempts to salvage the orchards fail: Bader Farms bleeds profits trying to rescue dicamba-battered trees and replaces dead trees only to watch dicamba kill new plantings before they mature. PLAppx-169-171, 176-179, 187. Consequently, Bader Farms' continued peach operations suffer more losses than would result from shuttering the peach business entirely. DEFAppx-701.

SUMMARY OF THE ARGUMENT

Far from "tort law run amok," the District Court, former Missouri Supreme Court Justice Stephen N. Limbaugh, Jr., expertly analyzed the issues and concluded Defendants—not Plaintiff—misconstrue Missouri tort law. The District Court correctly held:

I. "Third party illegal use of dicamba on the Xtend seeds was…not an intervening and superseding cause: it was foreseeable and…foreseen…" BASFAddm-64. Such acts do not break the chain of causation. Neither do Monsanto's "pink sticker" and "no-spray" communications, which said nothing about dicamba dangers. "Monsanto knew that illegal spraying would occur before the 2015 release and that the 'pink sticker' warning not to use dicamba would not prevent it." BASFAddm-63. Missouri's Approved Instructions do not allow a separate "foreseeability" instruction, and Monsanto's error-ridden Instruction U required rejection.

Benjamin Moore is inapplicable in this negligence case. While strict liability claims are about products, negligence liability is based on conduct. BASFAddm-41, 53-61. Defendants' liability proceeds from their conduct in releasing their dicamba-tolerant system, not from one, specific product comprising Defendants' system. "It was the [D]efendants' actions that

ushered in the use of over-the-top dicamba, and not a specific type of dicamba, that is the basis of liability." BASFAddm-21,41.

II. Missouri law allows Bader Farms to recover lost profits. BASFAddm-24-25. Defendants' landowner, property damage cases imposing a "diminution-in-value" measure are inapplicable. Plaintiff is a business (not a landowner) asserting claims for lost profits and mitigation expenses (not property damage). Missouri precedent and MAI 4.01 allow recovery of lost profits Plaintiff is "reasonably certain to sustain in the future" due to Defendants' negligence.

III. Defendants' disclaimers in some (but not all) of their written contracts do not foreclose a joint venture because "The acts and conduct of the parties…may speak above the expressed declarations of the parties to the contrary." *Denny v. Guyton*, 40 S.W.2d 562, 583 (Mo. *banc* 1931). The required intent for joint venture is not intent to form a joint venture, but intent to enter a relationship which, in law, constitutes a joint venture. The jury concluded Defendants intended to form a relationship which met the joint-venture elements—a conclusion supported by "ample and persuasive" evidence. BASFAddm-12.

Defendants' "expectation of damage to other[s] is obviously sufficient to constitute unlawful purpose" and sustain a conspiracy. BASFAddm-18.

No intentional tort is required; a plaintiff need not prove conspirators intended to harm him, only that harm resulted. Conspiracy and joint venture are not inconsistent claims where, as here, Defendants maintained independent personal stakes in their venture.

IV. "Clear and convincing evidence established Monsanto's awareness that its release of the incomplete Xtend system in 2015 and 2016 would result in off-target dicamba injury to third-party farmers, its dependence on that very problem to drive its sales, and its aversion to doing anything to fix it. That satisfies the standard for punitive damages." BASFAddm-82. *Lopez* and *Alcorn* weigh against Monsanto because it dodged EPA registration, knew farmers intended to spray off-label, and turned a blind eye to damage it enabled and expected.

The District Court applied *Gore*'s guideposts, reducing punitive damages to $60 million (4:1 ratio). BASFAddm-48-51,83-84. This is not excessive. The ratio correctly includes actual and potential damages likely to result from Monsanto's conduct. Bader Farms sustained $15 million in indivisible damages due to year-after-year dicamba exposure beginning in 2015.

A 4:1 ratio comports with due process; anything less would not adequately punish or deter Monsanto—a $7.8 billion company. BASFAddm-

50. Net worth is a relevant, permissible consideration in assessing constitutionality of punitive awards.

V. Joint venturers are jointly and severally liable for punitive damages "based on acts of their copartners done in the course of partnership business." *Blanks v. Fluor Corp.*, 450 S.W.3d 308, 401–02 (Mo. App. 2014). A single-sum verdict is proper. Missouri's comparative fault statute does not apply to punitive damages assessed against a joint venturer. Nonetheless, BASF waived an allocation. BASF had ample notice and opportunity to defend against joint venture. BASFAddm-29-30,47.

STANDARDS OF REVIEW

This court reviews denial of a motion for judgment as a matter of law *de novo*, "viewing the evidence in the light most favorable to the verdict." *Klingenberg v. Vulcan Ladder USA, LLC*, 936 F.3d 824, 830 (8th Cir. 2019) (citations omitted). "[I]t is improper to overturn a jury verdict unless, after giving the nonmoving party the benefit of all reasonable inferences and resolving all conflicts in the evidence in the nonmoving party's favor, there still exists '*a complete absence of probative facts* to support the conclusion reached so that no reasonable juror could have found for the nonmoving party.'" *Hunt v. Nebraska Pub. Power Dist.*, 282 F.3d 1021, 1029 (8th Cir. 2002) (citations omitted).

"The [district] court's decision [denying a new trial motion] will not be reversed by a court of appeals in the absence of a clear abuse of discretion." *Keenan v. Computer Assocs. Int'l, Inc.*, 13 F.3d 1266, 1269 (8th Cir. 1994) (citations omitted).

ARGUMENT

I. DEFENDANTS' NEGLIGENT COMMERCIALIZATION OF THEIR DICAMBA-TOLERANT SYSTEM CAUSED BADER FARMS' INJURY.

A. Defendants Proximately Caused Bader Farms' Injury.

Proximate cause is a function of foreseeability. *Brown v. Davis*, 813 F.3d 1130, 1138 (8th Cir. 2016). Foreseeability is "whether a defendant could have anticipated a particular chain of events that resulted in injury or the scope of the risk that the defendant should have foreseen" and that he "knew or ought to have known…an appreciable chance some injury would result." *Id.* Where plaintiff's injuries are the "natural and probable consequence" of defendant's act or omission, liability attaches. *Lopez v. Three Rivers Elec. Co-op, Inc.*, 26 S.W.3d 151, 156 (Mo. *banc* 2000). Absolute certainty injury will occur is not required. *Winter v. Novartis Pharms. Corp.*, 739 F.3d 405, 408 (8th Cir. 2014). It is enough that the defendant knew or should have recognized the increased chance of injury. *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 865 (Mo. 1993).

1. Third-Party Dicamba Misuse Was Foreseeable.

The District Court viewed the evidence and held: "Third party illegal use of dicamba on the Xtend seeds was…not an intervening and superseding

cause: it was foreseeable and…foreseen…" BASFAddm-64. This is Missouri law.[1]

"An intervening cause is a new and independent force which so interrupts the chain of events as to become the responsible, direct, proximate and immediate cause of the injury." *Davidson v. Besser Co.*, 70 F. Supp. 2d 1020, 1026 (E.D. Mo. 1999). An intervening act is a superseding cause only when "independent of the original actor's negligence" and not a "foreseeable consequence of the original" negligent act. *Id.*; *Woodbury v. Courtyard Mgmt. Corp.*, Case No. 4:11-CV-1049 (CEJ), 2013 WL 4401822 at *3 (E.D. Mo. Aug. 14, 2013).

Third-party, foreseeable acts, whether misuse or illegal, do not break the chain of causation. *See First Nat'l Bank v. Goodnight*, 721 S.W.2d 122, 126-127 (Mo. App. 1986); *Accord Ford v. Monroe*, 559 S.W.2d 759, 762 (Mo. App. 1977) (intervening criminal act is superseding only where it "was not intended…and could not have reasonably been foreseen…"); *Scheibel v. Hillis*, 531 S.W.2d 285, 288 (Mo. banc 1976) (where foreseeable third-party

[1] Defendants' attempts to resurrect the District Court's April 10, 2017 order, which the Court vacated after further briefing dispelled its initial misapprehensions of the facts, are improper. DEFSAppx-72; BASFAddm-63.

act "is one of the hazards which makes a [defendant] negligent," even if the act is "intentionally tortious or criminal," defendant may still be liable).

The general proximate-cause test—whether the injury is the natural and probable consequence of a defendant's negligence—applies despite a third-party criminal act. *See Harris v. Hillvale Holdings, LLC*, No. 4:15-CV-1854-RLW, 2016 WL 3194364 *2-3 (E.D. Mo. June 6, 2016); *Am. River Transp. Co. v. Paragon Marine Servs.*, 213 F. Supp. 2d 1035, 1062-63 (E.D. Mo. 2002).

Third parties' off-label dicamba applications over Xtend crops were not "new and independent" "intervening acts." They were foreseeable, foreseen, and "part of the chain of proximate cause…" DEFSAppx-72.

No "special relationship" is required. The cases Monsanto cites for this proposition (MONBr-34-35) are limited to protecting business invitees from violent crime and still base their conclusions on foreseeability. *See, e.g., First Nat'l Bank*, 721 S.W.2d at 126-127 (defendant is "liable for injury" where "intervening force was foreseeable."). *Finochio v. Mahler* says nothing about special relationships but recognizes a "*reluctance* to hold a defendant liable if the chain of causation includes a series of events…over which the defendant has *absolutely no control*." 37 S.W.3d 300, 303 (Mo. App. 2000) (emphasis added).

Monsanto controlled the release of the Xtend system and controls Xtend-seed purchasers through its TUGs. Statement of the Case ("SOC")-6. Monsanto could have stopped illegal spraying by rescinding offenders' licenses but refused.[2] SOC-6.

Considering the evidence, the District Court concluded: Monsanto expected farmers to spray off-label dicamba over Xtend seed; a Monsanto document shows 50% of farmers intended to spray illegally and Monsanto considered this risk before releasing Xtend seed; "Monsanto relied on a 'defensive planting' strategy to drive adoption of the Xtend system;" "Monsanto also received warnings from academics and scientists, members of the agriculture community, and Monsanto's own employees. Third party illegal use of dicamba on the Xtend seeds was therefore not an intervening and superseding cause: it was foreseeable and in fact foreseen by Monsanto." BASFAddm-63-64.

Ashley Cnty. v. Pfizer supports the outcome here as the lynchpin was foreseeability.[3] 552 F.3d 659, 667 (8th Cir. 2009). The Court recognized

[2] Monsanto knew four large growers did most of the illegal spraying in the Bootheel. SOC-7.

[3] Monsanto's reliance on gun and explosive cases is equally unavailing as those cases hinge on lack of foreseeability. *City of Chi. v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1121, 1134-1135 (Ill. 2004); *Gaines-Tabb v. ICI Explosives USA*, 995 F. Supp. 1304, 1314-1316 (W.D. Okla. 1996).

proximate cause is usually a fact question for the jury and only a question of law where "reasonable minds could not differ." *Id.* The issue was whether a statewide methamphetamine epidemic, costing significant taxpayer dollars and precipitating rampant crime, was the natural and probable consequence of defendants' manufacture and sale of cold medicine. The Court concluded it was unforeseeable. *See id.* at 671 (Arkansas law).

Ashley Cnty., and the gun cases analyzed therein, considered whether a "long and tortuous" route separated the original negligent act and the harm; whether multiple steps were involved; and whether those steps were reasonably foreseeable. *Id.* at 669. Liability hinged on who should bear the "societal costs" of the "societal problems" created. *Id.* at 672.

The instant case does not involve remote, endemic societal costs or various manufacturers that may or may not be related to the harm. There are no "long and tortuous" steps between planting dicamba-tolerant seed and spraying dicamba over it. Defendants' argument that Pandora's Box will be opened by imposing liability on the creators of a "dicamba-tolerant" system for damage caused by off-label spraying they expected and considered in their risk-benefit analysis before launching the system is preposterous.

2. Defendants' So-Called "Warnings" Do Not Negate Foreseeability.

A warning is no defense to product misuse unless it fully apprises users of the danger. *Winter v. Novartis Pharms. Corp.*, 882 F. Supp. 2d 1113, 1122-1123 (W.D. Mo. 2012); BASFAddm-74-75. Monsanto's "pink sticker" and "no-spray" communications said nothing about dicamba dangers or off-target-injury risks. SOC-4-5; BASFAddm-74. Monsanto even joked about being "renegades" who hoped one pink sticker would keep them "out of jail." SOC-4. Failing to warn and educate growers resulted in Xtend-seed users not knowing the dangers of applying dicamba. DEFSAppx-522-523; PLAppx-394-395.

Even where misuse is contrary to a defendant's instructions, that defendant can still be liable where misuse was reasonably anticipated, as here. *See Johnson v. Medtronic, Inc.*, 365 S.W.3d 226, 237-38 (Mo. App. 2012). And where, as here, a defendant's acts or omissions render misuse foreseeable, it cannot hide behind the cloak of instructions or warnings that it negated with its own efforts. *Winter*, 739 F.3d at 409; BASFAddm-22-23.

The District Court concluded: "Monsanto knew that illegal spraying would occur before the 2015 release and that the 'pink sticker' warning not

to use dicamba would not prevent it." BASFAddm-63. Plaintiff established proximate cause. BASFAddm-63-64, 69.[4]

3. Monsanto Was Not Entitled To An Intervening, Superseding Cause Instruction.

Instructional error is reviewed for abuse of discretion. *Lasley v. Running Supply, Inc.*, 670 F. App'x 910, 912 (8th Cir. 2016). The Court considers "whether the jury instructions, taken as a whole, fairly and adequately represent the evidence and applicable law in light of the issues presented to the jury...." *Linden v. CNH Am., LLC*, 673 F.3d 829, 836 (8th Cir. 2012) (quotations omitted). "[T]his court reverses only where [instructional] error affects the substantial rights of the parties," *Bauer v. Curators of Univ. of Mo.*, 680 F.3d 1043, 1044 (8th Cir. 2012) (quotations omitted), and "a new trial is necessary only when the errors misled the jury or had a probable effect on the jury's verdict." *Slidell, Inc. v. Millennium Inorganic Chems., Inc.*, 460 F.3d 1047, 1054 (8th Cir. 2006).

[4] The District Court found no distinction between legal and illegal dicamba spraying from 2017-present, as the volume sprayed over Xtend crops loaded the atmosphere with dicamba, damaging Bader Farms' orchards. BASFAddm-40-42. Monsanto's fn. 1 is a variation of Defendants' product-identification argument. Defendants' negligent conduct releasing the Xtend system and ushering in over-the-top dicamba use is the basis of liability and caused Plaintiff's harm. BASFAddm-20-21. No new trial is warranted.

The verdict directors in this case conformed to MAI, which does not allow a specific foreseeability discussion. DEFSAppx-843-44; BASFAddm-65-66; MAI 25.09. Since "the Missouri Approved Jury Instructions . . . are the substantive law of the state," *Lockhart v. U.S.*, 834 F.3d 952, 955 (8th Cir. 2016) (citation omitted), there is no error in giving an MAI tailored to the evidence.

Affirmative converse instructions, like Monsanto demanded, are disfavored (BASFAddm-65) because they "consistently violate the rules restricting their use." *Hiers v. Lemley*, 834 S.W.2d 729, 735 (Mo. banc 1992)("the judicial landscape is littered with reversals and retrials in cases where affirmative converse instructions were given"). Third-party negligence "is properly submitted in the causation element of the verdict director and reference thereto in an additional instruction is confusing and misleading . . ." MAI 1.03 (Committee Comments); *accord Bening v. Muegler*, 67 F.3d 691, 696-98 (8th Cir. 1995) (affirmative converse on intervening cause reversible error because verdict directors' causation requirement "permitted full consideration of all causation issues and all parties' arguments based on the evidence.").

Monsanto's Instruction U was a prohibited "sole cause" instruction, requiring rejection. DEFSAppx-772; MAI 1.03. Also fatal, it violated MAI

33.05(1)'s form and content requirements and was untimely[5]. BASFAddm-66-67. The MAI verdict director considered whether Defendants used ordinary care and whether Defendants' actions caused Plaintiff's damage, insulating Defendants from liability for third-parties' unforeseeable acts—Monsanto was not prejudiced. DEFSAppx-843-44. The District Court acted within its discretion.

B. Defendants' Negligent Conduct Caused Plaintiff's Damage.

1. Releasing Xtend Was Negligent.

Defendants' liability proceeds from their negligent conduct in releasing their dicamba-tolerant system (complete and incomplete), which caused Bader Farms' injury.

The District Court rightly rejected Defendants' reliance on *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110 (Mo. 2007) and *Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241 (Mo. 1984). Judge Limbaugh, who presided over *Benjamin Moore*, is intimately familiar with the decision and deemed it inapplicable. BASFAddm-20-21, 53-54.

First, *Benjamin Moore* and *Zafft* are product-identification cases assessing a market-share liability theory where plaintiffs could not

[5] The District Court spent several evenings with the parties, crafting instructions and allowing Defendants to argue their proposals "ad nauseam." DEFSAppx-817; BASFAddm-67.

determine *any* of the products' suppliers. *Benjamin Moore*, 226 S.W.3d at 113; *Zafft*, 676 S.W.2d at 242, 245-246. Here, the dicamba-tolerant system's manufacturers are known. The product at issue is the system. BASFAddm-20, 41. Defendants designed, manufactured, and sold the system, and its use caused Bader Farms' damage. SOC-9-11.

Second, Plaintiff submitted negligent design and failure to warn claims—not strict-liability product claims. PLAppx-282; DEFSAppx-778, 843-844. The District Court correctly held, while strict liability claims are about products, negligence claims impose liability based on a defendant's conduct, rendering *Benjamin Moore* irrelevant. BASFAddm-41, 53-61, 72-75 (citing *Martin v. Survivair Respirators, Inc.*, 298 S.W3d 23, 31 (Mo. App. 2009)). Whether XtendiMax or Engenia migrated in sufficient quantities to independently harm Plaintiff's orchards "ignores [Defendants'] conduct in the creation and commercialization of the DT system, and it is [Defendants'] conduct that was on trial—not [their] particular product…." BASFAddm-20-21, 41.

Defendants' product-identification arguments are irrelevant, since no dicamba is safe for over-the-top, in-season use due to inherent volatility. DEFSAppx-504-505; PLAppx-17, 227, 232-237, 247-249. Defendants' system was designed to allow never-before-possible, over-the-top dicamba

use during the growing season. SOC-2. Ushering in that change and the resulting harm, not the specific dicamba sprayed, is the basis of liability. BASFAddm-20-21, 41-42, 53-54.

Xtend seed's proliferation caused massive quantities of dicamba to be sprayed around Bader Farms, volatilizing, loading the atmosphere, and migrating as a "cloud of dicamba" onto its orchards.[6] BASFAddm-31-35, 40-41, 53-61. Therefore, the District Court held it unnecessary to identify which dicamba hit Bader Farms. DEFSAppx-777. The jury concluded Defendants' conduct commercializing this dicamba-tolerant system "caused or contributed to cause" Plaintiff's damage. DEFSAppx-843-844, 847. That is all that is required. *Callahan*, 863 S.W.2d at 863, 866; *Blevins v. Cushman Motors*, 551 S.W.2d 602, 607-608 (Mo. 1977); *Blanks*, 450 S.W.3d at 373-374.

Monsanto denies any duty, but this ignores Missouri law. *Martin*, 298 S.W.3d at 31-32; *Hopkins v. Chip-In-Saw, Inc.*, 630 F.2d 616, 619 (8th Cir. 1980). Duty is "based on the foreseeable or reasonable anticipation that

[6] Pre-2015, dicamba's *national* use was limited to roughly 6 million pounds annually. DEFSAppx-502-503. Bootheel usage was far below the national average. DEFSAppx-503-504, 513-516. Xtend's introduction increased usage ten-fold to roughly 60 million pounds annually, causing dicamba complaints in the Bootheel to soar. DEFSAppx-347-349; PLAppx-314-315, 330-331, 348-349, 402-407.

harm or injury is a likely result of acts or omissions." *Blevins*, 551 S.W.2d at 607-608 (citations omitted). Defendants have a "social responsibility to use due care to avoid injuring" non-DT users. *Thompson v. Brown & Williamson Tobacco Corp.*, 207 S.W.3d 76, 98 (Mo. App. 2006) (quotation and citation omitted); BASFAddm-68. "Foreseen" harm to non-DT farmers, like Bader Farms, created a "clear" duty. BASFAddm-69.

Third, unlike manufacturers in *Benjamin Moore* and *Zafft*, Defendants were not simply one of numerous market contributors; they created the market. Defendants designed and sold the system expecting harm to result. They had a "participatory connection" for their own profit and benefit with the "injury-producing product and the enterprise that created consumer demand for and reliance" on the system. *Ford v. GACS, Inc.*, 265 F.3d 670, 680 (8th Cir. 2001). Placing Xtend technology in the stream of commerce, owning the intellectual property, jointly marketing, sharing profits, and receiving compensation via licensing fees, distinguishes Defendants from the manufacturers in *Benjamin Moore* and *Zafft*. *See Emmons v. Bridgestone Americas Tire Operation, LLC, et al.*, No. 1:10-CV-41-JAR, 2012 WL 6200411 *3-4 (E.D. Mo. Dec. 12, 2012).

Defendants' cited cases do not support *Benjamin Moore*'s application. In several, the defendant merely purchased the defective product. *Ford*, 265

F.3d 670; *Long v. Cottrell, Inc.*, 265 F.3d 663, 669 (8th Cir. 2001); *Mouser v. Caterpillar, Inc., et al.*, No. 4:98CV744 FRB, 2000 WL 35552637 *16 (E.D. Mo. Oct. 6, 2000). The others are even less relevant. MONBr-40, 42-43. Other cases are more instructive.

In *Wagner v. Bondex Int'l, Inc.*, 368 S.W.3d 340, 350 (Mo. App. 2012), Mr. Wagner was "right there" when the asbestos-containing materials were mixed, asbestos-containing dust "fell like snow," he was in close proximity with asbestos materials, and the cumulative effect of this exposure contributed to cause his injury. *Id.* at 352-353. The court explained the "test of proximate cause is whether" defendant's conduct "sets in motion the chain of circumstances leading to the plaintiff's injuries or damages." *Id.* at 354 (quotation and citation omitted). *Wagner* rejected the notion that plaintiffs must prove which asbestos fiber contained in defendants' products caused the injuries. *Id.* at 350.

Blanks found *Benjamin Moore* and *Zafft* "readily distinguishable," stating, "in those cases, multiple sources of the offending agent…existed…Here…we only have one source of the offending agent – the smelter." *Id.* at 372. "The critical inquiry" "is whether plaintiffs have established a connection between a defendant's negligent act or omission and the injury suffered…." *Id.* The court held plaintiffs' lead poisoning was

the "reasonable and probable consequence of defendants' conduct," acts, and omissions. *Id.* at 374.

Bader Farms is surrounded by dicamba-tolerant system users. SOC-9-11. Like plaintiff's expert in *Wagner*, Dr. Baldwin testified cumulative dicamba exposures weakened the peach trees, leading to decreased productivity and eventual death. *Id.* Causation is established.

2. Defendants' Spuriously Deny A "Dicamba-Tolerant System."

> Evidence established that Monsanto did sell the Xtend crop system. Defendants … entered into an agreement called the "Dicamba Tolerant Systems Agreement" with the goal of bringing this product to market. Defendants' own marketing materials refer to it as the Xtend "crop system." Monsanto employee Boyd Carey admitted it was a "crop system."[7] That each item is purchased separately does not negate the system's existence.

BASFAddm-68.

Defendants' own documents prove the existence of the dicamba-tolerant system. PLAppx-302-304, 355, 371-372. It is irrelevant that each component is purchased separately—dicamba is the defining, indispensable characteristic of the system. *May v. Air & Liquid Sys. Corp.*, 129 A.3d 984, 1000 (Md. 2015). The only reason Xtend seeds were "genetically modified is to allow that crop to be sprayed with dicamba…" PLAppx-39-40;

[7] PLAppx-41.

BASFAddm-68-69. Introduction of Defendants' dicamba-tolerant system in the Bootheel ensured dicamba would be sprayed over-the-top—just as Defendants intended and advertised. PLAppx-238-239; DEFSAppx-520-521, 601.

The District Court acted within its discretion, refusing to define the "dicamba-tolerant system" in the instructions. *Linden*, 673 F.3d at 836. Likewise irrelevant are Defendants' component-part cases where the defendant is a mere cog in the wheel of another's system. *Sperry v. Bauermeister, Inc.*, 804 F. Supp. 1134 (E.D. Mo. 1992) *aff'd* 4 F.3d 596 (8th Cir.); *Temporomandibular Joint (TMJ) Implants Prods. Liab. Litig.*, 97 F.3d 1050, 1057-1058 (8th Cir. 1996). Here, Defendants designed and created their system: Missouri law allows liability. *See id.*

II. MISSOURI LAW ALLOWS BADER FARMS TO RECOVER LOST PROFITS.

A. The "Diminution-In-Land-Value" Method Is Inapplicable.

The District Court rightly rejected a "diminution-in-land-value" cap on Bader Farms' damages. Missouri's Supreme Court, in *Matthews v. Missouri P.R. Co.*, held "[n]o rule is just which does not afford to the injured person fair compensation for the loss or damage he has sustained." 44 S.W. 802, 807 (Mo. 1898). And "we think [the diminution-in-land-value method], in

order to reach just results, can generally be applied only to cases in which the injury is done to the real estate itself, as distinguished from injury or destruction of what may be erected or grown upon it." *Id.* Where what is damaged "has an ascertainable value," the owner can recover for "the loss he suffers." *Id.* That fundamental principle survives. *See Washington University v. Aalco Wrecking Co.*, Inc., 487 S.W.2d 487, 492 (Mo. 1972) (quoting *Matthews*).

Defendants' cases applying a diminution-in-land-value method are inapposite because they involve landowners' property damage claims—not business owners' lost-profit claims. *See, e.g.*, MONBr-46, 48-49.

BASF's quote from *Cooley* highlights the inapplicability of the diminution-in-land-value method: "[I]n suit for 'damages for the destruction of' trees, 'the measure of damage of the owner of the land . . . is the difference in the value of the land before and after the destruction of the trees." BASFBr-30 (quoting *Cooley v. Kansas City, P. & G.R. Co.*, 51 S.W. 101, 104 (Mo. 1899))(emphasis supplied). Here, Bader Farms is not "the owner of the land." PLAppx-193-194, 208. And its claims are not limited to "damages for the destruction of trees."

Cooley held, where (as here) "ownership of the land is distinct from that of the trees," applying a diminution-in-land-value measure "is, of

course, preposterous." 51 S.W. at 104. Rather, it is necessary to look for the best evidence of tree value, which could be determined by experts "competent to testify their opinions of the value of such trees." *Id.* This is what Dr. Guenthner did when determining the net present value of Plaintiff's peach trees, based upon their reasonably expected profitability, discussed below.

Defendants cannot recast Bader Farms' claims as landowner, property damage claims to impose their preferred damages measure. In *Keller Farms*, this Court recognized, "[Plaintiff] was the master of its complaint and chose to proceed under only [Missouri's trespass statute]. That choice limited it to pursuing only its tree-damage claim under the trespass statute." 944 F.3d at 980 (trespass damages limited to diminution-in-property value). Bader Farms was the master of its complaint and chose to pursue negligence claims to recover lost profits.[8]

[8] Contrary to Monsanto's misquotes, *Keller Farms* does not prohibit lost-profits recovery in fruit tree cases. MONBr-46. It involved windbreak and ornamental trees having no fruit production or commercial value, and included no lost-profits claim. *Keller* at 979-981. This Court recognized, "'[t]he particular facts and circumstances of each case dictate' the applicable measure of damages" but "claims under section 537.340 for damage to windbreak or ornamental trees . . . 'must be distinguished' from the measure of damages applicable in other situations." *Id.* at 982 (citations omitted).

Defendants seek to turn Missouri law on its head. The purpose of a "diminution-in-land-value" damages measure "is based on the obvious reason that the value of such trees, considered apart from the land, would not be adequate compensation" for the injury. *Barnes v. Arkansas-Missouri Power Co.*, 281 S.W. 93, 95 (Mo. App. 1926). Limiting Bader Farm's recovery to "diminution in (someone else's) land value" when its actual damages include massive lost profits incurred by its peach business, "would not be adequate compensation" for its injury.

Missouri law is not so limited.

B. The District Court Correctly Applied Missouri Law Allowing Lost-Profit Recovery.

Judge Limbaugh concluded Missouri precedent allows future lost profits recovery. BASFAddm-24-25 (applying *Shady Valley Park & Pool v. Fred Weber, Inc.*, 913 S.W.2d 28, 34-35 (Mo. App. 1995)). In *Shady Valley*, the plaintiff operated wholesale fish hauling and fee fishing businesses. *Id.* at 31. [9] The defendant caused mud and silt to flow into plaintiff's lakes, forcing the businesses' closure. *Id.* at 34. The court held the proper damages measure included future losses attributable to the businesses' closure, not change in property value. *Id* at 34-35.

[9] Aquaculture is agriculture. *See* https://nifa.usda.gov/topic/aquaculture.

The District Court correctly held *Shady Valley* is "the closest [Missouri] case," and is consistent with Missouri law reflected in MAI 4.01, which applies "when damage goes beyond mere property loss." BASFAddm-25; *Shady Valley*, 913 S.W.2d at 35. MAI 4.01 only allows recovery of future lost profits "plaintiff is 'reasonably certain to sustain in the future,'" which prevents "speculative" damages. BASFAddm-25.

The cases Defendants cite to argue crop losses are speculative are inapposite. *Boggs v. Mo.-Kan.-Tx. Ry. Co.* involved annual crops—not perennial trees—and held recovery for future crops plaintiff "might have planted"[10] went "too far into the realm of speculation and uncertainty." 80 S.W.2d 141, 144 (Mo. 1934). Plaintiff's already-planted orchards were productive for decades; the jury had ample information (and an instruction) to eliminate speculation. Notably, *Boggs* and *Beaty v. N. W. Elec. Power Co-op, Inc.*, 312 S.W.2d 369, 372 (Mo. App. 1958), rejected diminution-in-land value, relying on *Couch v. Kansas City Southern Ry. Co.*, 158 S.W. 347 (Mo. 1913). *Couch,* consistent with *Matthews* and *Cooley*, recognized that damages rules are general guides "to promote justice" or "put aside when it leads in the opposite direction." *Id.* at 348. Missouri's Supreme Court

[10] Monsanto omits this phrase. MONBr-46.

mandate for fair and flexible damage determinations is unbroken precedent—a strict diminution-in-land-value cap is not.

Long-standing Missouri precedent allows lost profits recovery. *See, e.g., Ameristar Jet Charter, Inc. v. Dodson Int'l Parts, Inc.*, 155 S.W.3d 50, 54 (Mo. banc 2005); *Volume Services, Inc., v. C.F. Murphy & Associates, Inc.*, 656 S.W.2d 785, 792 (Mo. App. 1983).

Lost-profit determinations are not an exact science, *Gateway Foam Insulators, Inc. v. Jokerst Paving & Contracting, Inc.*, 279 S.W.3d 179, 186 (Mo. banc 2009), but require "evidence that provides an adequate basis for estimating the lost profits with reasonable certainty." *Ameristar Jet,* 155 S.W.3d at 54. "While an estimate of prospective or anticipated profits must rest upon more than mere speculation, uncertainty as to the amount of profits that would have been made does not prevent a recovery." *Id.* at 54–55 (internal quotation omitted). When profit loss "defies exact proof…it is reasonable to require a lesser degree of certainty as to the amount of the loss, leaving a greater degree of discretion to court or jury." *Id.* (internal quotation omitted).

In *In re Genetically Modified Rice Litigation*, the court held plaintiff's future damages were not too speculative, concluding: "plaintiff provided evidence based on plaintiff's actual yields, government crop data, and

accepted economic calculations to demonstrate that it suffered market loss, future, and alternative crop yield and crop variety damages." 4:06-MD-1811-CDP, 2010 WL 4643265, *1 (E.D. Mo. Nov. 9, 2010). This reflects Missouri law and describes Bader Farms' evidence.

Even Defendants' cited cases allow established businesses to recover anticipated profits when proved with reasonable certainty. *See, e.g.*, MONBr-50-51. *Racicky v. Farmland Indus., Inc.*, 328 F.3d 389 (8th Cir. 2003), cited by Monsanto (MONBr-49), explains future agricultural profits are recoverable when supported by evidence like Bader Farms introduced. *See id.* at 397-400.

C. Substantial Evidence And Expert Testimony Support The Jury's Damage Award.

Generally, in calculating lost profits, "lost revenue is estimated, and overhead expenses tied to the production of that income are deducted." *Ameristar Jet*, 155 S.W.3d at 55. "To create an adequate basis for an award of lost profits, a plaintiff must provide evidence of the income and expenses of the business for a reasonable time before the interruption caused by defendant's actions." *Wandersee v. BP Prods. N. Am., Inc.*, 263 S.W.3d 623, 633 (Mo. 2008). In *Wandersee*, in addition to plaintiff's tax returns for three years prior to the damage, plaintiff testified about profits not reflected in tax records and what expected profits would have been absent the injury; the

Court deemed this evidence adequate. *Id.* at 634; *see also Gateway Foam*, 279 S.W.3d at 186 (plaintiff's accountant's testimony regarding her lost-profits calculations was sufficient). Plaintiff's evidence exceeds that deemed adequate in *Wandersee* and *Gateway Foam*.

1. Extensive Evidence Supported Bader Farms' Historical And Projected Peach Profits.

Defendants omit Plaintiff's substantial damages evidence, offering only their competing argument and evidence. However, "the jury weigh[ed] the evidence and credibility of witnesses," and the District Court correctly refused to "substitute its judgment for the jury's weighing of the evidence." BASFAddm-26.

Bader Farms' detailed, peach-production evidence included: historical peach revenues; expenses; tree plantings; acres of bearing versus nonbearing trees; production according to tree age; tree lifespan; dicamba impact on peach size and pricing; sales data; customers; pack-out rate; historical yields; weather events; unrelated herbicide damage, and the impact, or lack thereof, on yield, business operations, and planting; and insurance claims. PLAppx-131-166, 170-171, 175-192, 194-203, 209-217; DEFSAppx-482, 494-495, 1083-1084.

Prior to Defendants' dicamba-tolerant system, Bader Farms was in growth mode. Its annual peach revenue from 2011-2014 (on average yields

of 75,903 bushels) averaged $2,285,354. PLAppx-142-144, 164-166, 170, 175, 206-207; DEFSAppx-652-653, 1083-1084. Beginning in 2010, Bader Farms planted 50,000 trees reasonably expected to increase production to 100,000 bushels/year by 2015 and, upon maturity, to previously achieved levels (160,000+ bushels/year) for decades to come. PLAppx-155-158.[11]

However, beginning in 2015, dicamba damage cratered expected production and revenues and necessitated substantial mitigation expenses. PLAppx-165-166, 169-182; DEFSAppx-477, 482. As a result, Plaintiff's continued peach operations incur substantially higher losses than shuttering the business entirely. DEFAppx-701. The District Court limited Bader Farms to seeking losses associated with ending its peach operations (i.e., mitigation), and Dr. Guenthner conservatively calculated these mitigated damages. PLAppx-3-4; BASFAddm-24; DEFAppx-701.

2. Dr. Guenthner's Calculations Are Not Speculative.

Dr. Guenthner used the standard agricultural-economic practice of comparing actual to reasonably expected profit. DEFSAppx-630-631. With orchards, experts use tree lifespan to estimate expected profits. Dr. Guenthner conservatively used a 20-year lifespan. DEFSAppx-629-630

[11] Defendants' feigned shock at Dr. Guenthner's damage calculations ignores this evidence.

PLAppx-251. He relied on detailed acres, yield, price, and cost data, and his calculations encompass 100+ spreadsheet pages. DEFSAppx-631-633, 637-646, 661-662, 697, 700; PLAppx-251-254, 259-260.

Dr. Guenthner determined Plaintiff's peach orchards' net present value in 2015 was $16.7 million; the net present value of post-2015 plantings was $6.1 million. DEFSAppx-646-647, 1085. He researched mitigation expenses and asset value. PLAppx-256-257. He reduced damages by Plaintiff's actual, albeit substantially compromised, profits from 2015 forward and subtracted what could be earned with less-profitable row crops (more mitigation). PLAppx-258; DEFSAppx-649. Dr. Guenthner calculated approximately $20.9 million in damages, limiting damages to total loss of the orchards. DEFSAppx-651, 1085.

Plaintiff's evidence is adequate (*Wandersee* and *Gateway Foam*) and consistent with the tree-valuation approach approved in *Cooley*. *Supra*, II.A., IIC.

3. The Jury Weighed Defendants' Competing Evidence And Arguments To Determine Damages.

Defendants distort evidence to make points that are untenable when the actual evidence is examined, whereas this Court must draw all reasonable inferences in Plaintiff's favor. *See Hunt*, 282 F.3d at 1028.

Defendants pluck numbers from Bader Farms' tax statements to manufacture inapplicable "profit" numbers. MONBr-20, 51, BASFBr-16. However, tax accounting for Plaintiff's combined, multi-crop operations—after the benefit of available tax deductions—is vastly different from calculating peach profits. PLAppx-205-207. Taxable income is not indicative of profitability (e.g., Amazon), and Dr. Guenther testified tax statements are not useful to calculate lost orchard profits. DEFSAppx-643-644, 699-700. The District Court held, "The tax evidence was provided to the jury … through both defendants' cross examinations and closing argument, and the jury had the ability to weigh the evidence and the credibility of witnesses." BASFAddm-26. The Court refused to invade the jury's province. *Id.*

Defendants' post-trial reference to "Quality Peaches by the Bushel or Truckload!" on Bader Farms' old website is deceptive. Defendants know the webpage has not been updated since 2012, which means—if anything—it confirms Plaintiff's *pre*-dicamba profitability. PLAppx-286-292. Bader Farms sustains greater losses attempting to farm peaches in a dicamba environment. DEFSAppx-701.

MAI 4.01 directed the jury to award Plaintiff "any damages you believe it sustained and is reasonably certain to sustain in the future," and the jury

awarded $15 million, substantially less than Plaintiff requested. DEFAppx-845, 848. The District Court properly accepted "the jury's weighing of the evidence." BASFAddm-26.

III. JOINT VENTURE AND CONSPIRACY.

A. Defendants Acted In A Joint Venture.

1. Missouri Joint Venture Law.

A joint venture is "an association of two or more persons to carry out a single business enterprise for profit." *Ritter v. BJC Barnes Jewish Christian Health Sys.*, 987 S.W.2d 377, 387 (Mo. App. 1999). It is a partnership for a limited purpose. *See Jeff-Cole Quarries, Inc. v. Bell*, 454 S.W.2d 5, 14-15 (Mo. 1970).

A joint venture "may be implied in whole or in part from the conduct of the parties" and "established without any specific formal agreement to enter into a joint enterprise; it may be implied or proven by facts and circumstance showing such enterprise was in fact entered into." *Denny v. Guyton*, 40 S.W.2d 562, 570 (Mo. *banc* 1931) (citations omitted).

2. Defendants' Disclaimers In Some (But Not All) Of Their Contracts Are Not Dispositive.

Defendants inked numerous agreements pertaining to their dicamba-tolerant system. Some disclaim a partnership, but others do not. DEFSAppx-1247-1293, 1330, 1377; PLAppx-373-377. The Umbrella

Agreement, which created Defendants' AMT jointly governing their dicamba project, has no disclaimer. DEFSAppx-1247-1293. The 2014 Letter Agreement also has no disclaimer. PLAppx-373-377.

BASF documents admit Defendants' relationship is a "joint venture." A 2015 BASF invoice to Monsanto sought $349,922.51 for "the Dicamba Joint Venture." PLAppx-388-390. BASF told EPA: "BASF and Monsanto Corporations ***are engaged in a joint venture***...." PLAppx-274-275, 355 (emphasis supplied).

Defendants' spotty disclaimers do not immunize them. The District Court correctly held, "Regardless of the ARDTSA's disclaimer of a partnership or joint venture, 'the question here is whether the evidence shows, by facts and circumstances, that one was in fact created.'" BASFAddm-10 (quoting *Jeff-Cole Quarries, Inc.*, 454 S.W.2d at 16). "The required intent necessary to find a partnership existed is not the intent to form a partnership, but the intent to enter a relationship which in law constitutes a partnership." *Id.* at 10, 12 (quoting *Hillme v. Chastain*, 75 S.W.3d 315, 317 (Mo. App. 2002)).

BASF's contract negotiator boasted she knows "what not to put in a contract" to avoid joint-venture liability. PLAppx-266. However, she had no

idea what constitutes a joint venture under Missouri law. PLAppx-266-267. This is why "magic language" in an agreement is not dispositive.

The District Court explained "an express statement of corporate form is important evidence in a joint venture analysis, but the written agreements do not end this Court's inquiry." BASFAddm-7 (emphasis added). This accords with *Guyton*: because a joint venture "may also be inferred from the acts and conduct of the parties," it is necessary to consider "the facts and circumstance in evidence some of which…outweighed the denials of [] defendants and other evidence introduced in their behalf." 40 S.W.2d at 583. "The acts and conduct of the parties … may speak above the expressed declarations of the parties to the contrary." *Id.* (finding joint venture existed even though it conflicted with defendants' stated corporate forms).

Consistent with *Guyton*, *Jeff-Cole Quarries* held: "There certainly was no evidence of an express agreement to create a joint venture … the question here is whether the evidence shows, by facts and circumstances that one was in fact created." 454 S.W.2d at 15-16. This is the relevant inquiry.

The jury concluded the facts and circumstances proved Defendants intended to form a relationship which met the joint-venture requirements. PLAppx-283; DEFSAppx-849. The jury discredited Defendants' "disclaimers" and decided Defendants' acts and conduct "outweigh[ed] the

denials of [Defendants] and other evidence introduced in their behalf" and "spoke above the expressed declarations of the parties to the contrary." *Guyton*, 40 S.W.2d at 583. This is Missouri law. Holding otherwise allows joint venturers to escape liability with hollow contractual denials.

3. Sufficient Evidence Proves Joint Venture.

This Court "will not reverse a jury's verdict for insufficient evidence unless, after viewing the evidence in the light most favorable to the verdict, [it] conclude[s] that no reasonable juror could have returned a verdict for the non-moving party." *Vogt v. State Farm Life Ins. Co.*, 963 F.3d 753, 769 (8th Cir. 2020) (citations omitted). Plaintiff's joint venture evidence was "ample and persuasive." BASFAddm-12.

Community of Pecuniary Interest. Joint venture requires "a community of pecuniary interest" in a common purpose. *Ritter*, 987 S.W.2d at 387. Monsanto paid BASF "value share payments" as a means of sharing profits "for every single acre" of dicamba-tolerant seed planted, including 2015-present. PLAppx-268-269, 280-281, 357-360; DEFSAppx-1373-1374.

Defendants also shared valuable proprietary testing and data for regulatory approval, materials to enable testing and development, costs of dicamba testing, and they made capital expenditures to fulfill their reciprocal DT-project obligations. PLAppx-128-130, 272-273, 373-377.

The "value share payments" were Defendants' way of equitably distributing their DT-system's value, taking into account their respective capital investments in, contributions to, and sales generated from the project—this is shared pecuniary interest. BASFAddm-14.

"Sharing profits and losses is evidence of a community of economic interest." *TooBaRoo, LLC v. W. Robidoux, Inc.*, 614 S.W.3d 29, 40 (Mo. App. 2020), *reh'g and/or transfer denied* (Oct. 27, 2020), *transfer denied* (Jan. 26, 2021)(citations omitted). However, "[t]here need not necessarily be an agreement to share losses." *Id.* (quoting *Pigg v. Bridges*, 352 S.W.2d 28, 33 (Mo. banc 1961)). In *TooBaRoo*, shared pecuniary interest was evidenced by "increases in weekly draws and payment of bonuses, which increased as the joint venture experienced greater success(.)" 614 S.W.3d at 40. The same is true here. The District Court explained, "the concept of 'shared losses' cannot be rigidly applied in the same way to every joint venture relationship, especially where, as here, the parties to the joint venture bring different assets and risks to the table." BASFAddm-14. [12]

[12] Contrary to Defendants' assaults on Judge Limbaugh's legal analysis, the Court in *TooBaRoo* acknowledged: "[W]e find former Missouri Supreme Court Judge and current United States District Court Judge Stephen N. Limbaugh, Jr.'s commentary on this topic to be compelling." 614 S.W.3d at 42 ("opinions from the Missouri Court of Appeals failing to follow the most recent controlling precedent from the Missouri Supreme Court, as outlined

BASF's insistence the "value share payments" are not profit-sharing but rather "fixed" "royalty" payments is shattered by their own agreements, which use the phrase "value share payments"—not "royalties"—to describe payments which are not "fixed" but "increase as use of Xtend seed increased—in contrast to a fixed, guaranteed payment regardless of market penetration or sales volume." DEFSAppx-155.

Shared Control. A joint venture requires an "equal voice" among members "in determining the direction of the enterprise." *Ritter*, 987 S.W.2d at 387 (emphasis supplied). Equal control over, or responsibility for, every activity undertaken is not required. "[T]hat both [parties] exercised some degree of control over various aspects of the job [is] indicative of the requisite control necessary to find a joint venture." *TooBaRoo,* 614 S.W.3d at 40 (citations omitted).

Defendants' Umbrella Agreement created their AMT, with equal representation and votes, controlling the direction of, and approving the joint work plans for, their DT-system development, regulatory approval, and commercialization. PLAppx-125-127, 270-271. The parties jointly delegated responsibility for the seed launch to Monsanto. DEFSAppx-730, 1320.

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by Judge Limbaugh ...should no longer be followed" as to joint venture burden of proof).

Defendants' AMT conducted at least 19 meetings to jointly coordinate their DT-system commercialization.[13] PLAppx-273. Shared control is undeniable.

B. Defendants Acted In A Conspiracy.

BASF contends conspiracy requires "an unlawful objective," BASFBr-40; however, using "unlawful means to do a lawful act" is "an unlawful objective." *Gibson v. Brewer*, 952 S.W.2d 239, 245 (Mo. banc 1997). The District Court explained, "an expectation of damage to other[s] is obviously sufficient to constitute unlawful purpose." BASFAddm-18.

Missouri law does not require an underlying intentional tort to sustain a conspiracy claim; a "wrongful act" or "tort" suffices. *See Western Blue Print Co., LLC v. Roberts*, 367 S.W.3d 7, 22 (Mo. banc 2012).

Restatement (Second) of Torts § 876(a), Comment C, explains *tortious* conduct supports conspiracy. Illustration 2 hypothesizes co-liability for racers on a highway, one of whom injures a third party. *Id.* The racers did not intend harm—they acted negligently, harmed Driver C, and both are liable. *Gettings v. Farr*, 41 S.W.3d 539, 542-43 (Mo. App. 2001) embraces Illustration 2 to find co-conspirators to auto theft jointly liable for negligent

[13] The Umbrella Agreement, signed by BASF SE, required BASF Corp. to perform as an Affliate and BASF Corp. employees served on the AMT, DEFSAppx-1376. The Umbrella Agreement's AMT continued to oversee the dicamba project, including Defendants' joint defense of thousands of injury claims in 2017. PLAppx-266, 360-361.

operation of the car. *Id.* Joint liability attaches without specific contemplation that one of the co-conspirators will negligently cause injury. *Id.* at 543. *See also Blaes v. Johnson & Johnson*, 71 F.Supp.3d 944, 947 (E.D. Mo. Dec. 4, 2014) (allowed conspiracy claim without intentional tort).

BASF concedes "[t]he District Court found unlawfulness in evidence showing that 'defendants sold the products expecting that damage to third parties would increase their sales,'" but brazenly responds "[k]nowing that it could benefit from unlawful activity, though, is far from 'intend[ing] harm' to Bader." BASFBr-40-41. BASF misses the point. "Plaintiffs need not plead or prove the conspirators intended to harm them if they can show harm resulted." *Park Ridge Associates v. U.M.B. Bank*, 613 S.W.3d 456, 464 (Mo. App. 2020) (citation omitted); *see Gettings*, 41 S.W.3d at 543.

C. Joint Venture And Conspiracy Are Not Inconsistent Claims.

BASF insists "[a] principal cannot conspire with its own agent," BASFBr-41, but forgets[14] an exception exists when "the agent acts out of a self-interest which goes beyond the agency relationship." *Wiles v. Capitol Indemnity Corp.*, 280 F.3d 868, 871 (8th Cir. 2002).

[14] BASF recognized this exception in its post-trial briefing. DEFSAppx-959.

This exception applies here. Notwithstanding their joint venture to commercialize the dicamba-tolerant system, Defendants "were separately incorporated" and pursued "independent personal stakes" in their respective dicamba-herbicide sales. *Metts v. Clark Oil & Refining Corp*, 618 S.W.2d 698, 702 (Mo. App. 1981); BASFBr-38.

Finally, "[i]t is error to submit two counts together only if [they] are so inconsistent that proof of one necessarily negates, repudiates, and disproves the other." BASFAddm-19 (quoting *Trimble v. Pracna*, 167 S.W.3d 706, 711 (Mo. banc 2005). In fact, participation in a joint venture can *support* a conspiracy charge. *United States v. Krug*, 822 F.3d 994, 999 (8th Cir. 2016).

IV. PUNITIVE DAMAGES ARE WARRANTED AND COMPORT WITH DUE PROCESS.

This Court reviews for abuse of discretion the District Court's determination that Missouri law allowed the jury's punitive damages award; it reviews the constitutionality of that award *de novo*. *See Hallmark Cards, Inc. v. Monitor Clipper Partners, LLC*, 758 F.3d 1051, 1060 (8th Cir. 2014).

A. Missouri Law Allows Punitive Damages Here.

For punitive damages, Missouri requires clear and convincing evidence "the defendant acted with either an evil motive or a reckless indifference to the plaintiff's rights." *May v. Nationstar Mortg.*, 852 F.3d 806, 814 (8th Cir.

2017)(emphasis in original) (citing *Burnett v. Griffith*, 769 S.W.2d 780, 789 (Mo. *banc* 1989)). No "malice" requirement exists.

"Conscious disregard or complete indifference" occurs when defendant is "conscious from the knowledge of surrounding circumstances and existing conditions, that, although lacking in specific intent to injure, the person's conduct or failure to act will naturally and probably result in injury[.]" *Poage v. Crane Co.*, 523 S.W.3d 496, 520 (Mo. App. 2017). This is "tantamount to intentional wrongdoing." *Tubbs v. BNSF Ry. Co., Inc.*, 562 S.W.3d 323, 340-41 (Mo. App. 2018), *reh'g and/or transfer denied* (Oct. 23, 2018), *transfer denied* (Dec. 18, 2018).

1. Monsanto's Reckless Disregard Was Outrageous.

Monsanto consciously and repeatedly decided its desire for profits justified damaging innocent farmers, and it used expected damage to drive sales. SOC-2-9. Monsanto concealed the risks of its incomplete system, refused farmers' pleas for help, and planned to blame disease. SOC-3-4,6-9. Plaintiff's punitive damages evidence "was ample, clear, and convincing." BASFAddm-79.

The District Court observed this evidence and correctly held:

> Clear and convincing evidence established Monsanto's awareness that its release of the incomplete Xtend system in 2015 and 2016 would result in off-target dicamba injury to third-party farmers, its dependence on that very problem to drive its

> sales, and its aversion to doing anything to fix it. That satisfies the standard for punitive damages.

BASFAddm-82.

2. *Lopez* Factors Do Not Favor Monsanto.

Judge Limbaugh—who also presided over *Lopez*—ruled its mitigating factors "do not come out in Monsanto's favor." BASFAddm-82; *Lopez*, 26 S.W.3d 151.

Factor 1—"Prior similar occurrences known to the defendant have been infrequent." Farmers could not spray dicamba over soybean and cotton before Monsanto sold Xtend seed—it would have killed the crops. SOC-2. Monsanto's Xtend seed first enabled widespread dicamba use during warmer, summer months when volatility increases. SOC-2. Accordingly, lack of "prior similar occurrences" is irrelevant.

What matters is Monsanto's knowledge of the risks associated with its conduct. *See Koon v. Walden*, 539 S.W.3d 752, 774 (Mo. App. 2017) ("this factor goes to a defendant's knowledge"). Monsanto knew farmers intended to spray off-label, and it expected the resulting damage would drive its own sales. SOC-4-6. In these circumstances, a lack of prior occurrences is meaningless. *Koon*, 539 S.W.3d at 773-74; *Tubbs,* 562 S.W.3d at 342.

Factor 2—"The injurious event was unlikely to have occurred absent negligence on the part of someone other than the

defendant." Xtend-seed purchasers behaved exactly as Monsanto enabled and expected. Monsanto refused to enforce its grower license to prevent off-label spraying because doing so would hurt profits. SOC-6. And Monsanto included no warning on its pink seed tags to inform farmers about dicamba's off-target-injury risks. SOC-4-5.

Monsanto cannot avoid punitive damages by blaming its own customers, when Monsanto enabled their actions, failed to warn them of the risks, and turned a blind eye to them doing exactly as it knew they would do. *See Koon*, 539 S.W.3d at 774 (the second *Lopez* factor was not mitigating because "even though [plaintiff's] own actions contributed to his injury, in this case that does not outweigh the evidence suggesting that [defendant] turned a blind eye to signs that [plaintiff] needed help.").

Factor 3—"Defendant did not knowingly violate a statute, regulation, or clear industry standard designed to prevent the type of injury that occurred." When EPA declined to register Clarity for over-the-top use due to safety concerns, Monsanto skirted the regulatory process by launching its incomplete system without an EPA-registered dicamba, knowing growers would spray dicamba anyway. SOC-4. This is a far cry from regulatory compliance. Contrary to Monsanto's misstatement, the USDA did not "approve" Xtend seed; it de-regulated it and made no

determination about its safety when used with dicamba. PLAppx-278; *Shaka Movement v. County of Maui*, 842 F.3d 688, 701-703 (9th Cir. 2016). Consequently, Monsanto's incomplete system launch was entirely unregulated and an end-run around EPA's regulatory process.

Monsanto' reliance on *Alcorn v. Union Pacific Railroad Company*, 50 S.W.3d 226 (Mo. banc 2001) is misplaced. There, the Court reversed the punitive award because the railroad cooperated with the federal regulatory process. *Id.* at 233, 249. Conversely, here, Monsanto dodged the EPA-registration process and blocked testing to avoid alerting EPA to off-target movement. SOC-3-4. Monsanto insisted it is "EPA's responsibility" to ensure product safety. PLAppx-96. But Monsanto did not await EPA registration before selling its incomplete system: it knowingly took steps that violated the purpose of EPA regulations. *See Tubbs*, 562 S.W.3d at 343 (*Alcorn* and the third *Lopez* factor weigh against BNSF because it "knowingly took steps that violated the purpose of" regulations designed to prevent injury).

Monsanto's conduct defied industry standards. Industry stakeholders criticized Monsanto's release of Xtend seed without an EPA-registered dicamba as "reckless" and contrary to "the best interests of the farmers, industry, global, grains and system." PLAppx-64-65. Even Monsanto called

itself "renegades that launch a technology without a label and thinks one sticker is going to keep us out of jail." SOC-4.

Growers' purported demand for Xtend does not immunize Monsanto's reckless indifference and knowledge that off-target injury would occur. *JCB, Inc. v. Union Planters Bank, NA*, 539 F.3d 862, 873 (8th Cir. 2008)("[P]resenting [] evidence of good faith to the jury does not immunize a defendant from punitive damages… the jury may believe or disbelieve such evidence like any other."). The jury disbelieved Monsanto because Xtend-seed demand was driven by "defensive planting"—not the superior benefits of the product. SOC-6.

It is for the jury "to evaluate [the] evidence and decide what inferences should be drawn(.)" *May*, 852 F.3d at 814 (citations omitted). The District Court did not abuse its discretion.

B. The Punitive Award Comports With Due Process.

The District Court evaluated *Gore*'s guideposts and Defendants' arguments when reducing punitive damages to $60 million. BASFAddm-48-51, 83-84. Due process does not require further reduction. Monsanto's conduct shocks the conscience, the reduced punitive award does not.

1. *Gore*'s Guideposts Support The Award.

Reprehensibility. "Reprehensibility [of the conduct] is the most important guidepost." *May*, 852 F.3d at 816 (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996)). "The presence of just one indicium of reprehensibility is sufficient to render conduct reprehensible and support an award of punitive damages." *Id.* (citing *Trickey v. Kaman Indus. Techs. Corp.*, 705 F.3d 788, 803 (8th Cir. 2013)).

a. Repeated Conduct.

Monsanto's conduct involved repeated, reckless commercialization decisions. Monsanto knew off-label dicamba spraying would occur in 2015 but launched the incomplete system anyway. SOC-4. Monsanto knew off-label spraying was widespread in 2015 and would be "rampant" in 2016 but again sold Xtend cotton and launched Xtend soy without an approved dicamba. SOC-5. This was no isolated incident.

Monsanto, in its decade-long conspiracy with BASF, engaged in a "pattern of misconduct," which "constitutes repeated actions." *See May*, 852 F.3d at 816 (citations omitted). Monsanto repeatedly refused to heed industry and academic warnings, enforce its grower license, warn of off-target injury, investigate damage, and protect Bader Farms. Instead, Monsanto repeatedly chose profits.

Recidivist conduct is punished more harshly than isolated incidents and demonstrate "strong medicine" is required to deter further repetition. *Gore,* 517 U.S. at 576–77. This is true here.

Monsanto misstates *Williams v. ConAgra Poultry Co.*, 378 F.3d 790 (8th Cir. 2004), which does not say the "repeated conduct" factor "must be 'applied cautiously' and cannot by itself justify a large punitive award." MONBr-61. Rather, *Williams* says "duplicative punitive damages" could result "[i]f a jury fails to confine its [punitive award] deliberations to the specific harm suffered by the plaintiff(.)" 378 F.3d at 797. Here, however, the jury was instructed "you must not include damages for harm to others who are not parties to this case." PLAppx-285. Jurors are presumed to follow the instructions. *United States v. Barrera,* 628 F.3d 1004, 1010 (8th Cir. 2011). Monsanto does not deny they did. The District Court, then, further reduced the jury's punitive award. BASFAddm-51. Nor is there risk of duplicative punitive damages due to "related multi-district litigation" (MONBr-60-61) because that litigation has been settled. https://dicambasoybeansettlement.com/Content/Documents/Settlement%20Agreement.pdf.

b. Intentional malice, trickery, or deceit, or mere accident.

Although the District Court concluded there was no "actual malice" (BASFAddm-51), this factor also considers whether Monsanto's conduct was "mere accident." It was not. Rather, it was planned. The jury held Monsanto acted "with the expectation that off-target movement and damage to third-party farmers would increase sales of … dicamba-based products." PLAppx-284; DEFSAppx-849. This substantive conclusion supports a reprehensibility finding. *May*, 852 F.3d at 816 (citations omitted). Monsanto premeditated a "defensive planting" sales strategy, telling disinterested farmers they needed Xtend seed as "Protection from [their] neighbor." SOC-5. Monsanto planned to profit from damage it expected to cause. This is tantamount to intentional harm.

Monsanto was deceitful, blocking dicamba volatility testing to conceal off-target-injury risks. SOC-3-4. Monsanto's refrain that its testing ban is irrelevant to 2015-2016 because it involved its "improved" formulations, sold beginning in 2017, is nonsensical. Monsanto knew even improved dicamba would cause damage, and concealing this danger concealed the greater danger posed by older formulations in 2015-2016. Monsanto omitted these risks from its pink sticker—which it privately mocked. SOC-4-5. And, after a

dicamba bomb exploded in the Bootheel, Monsanto decided to "get on this right now!" and "deny! Deny! DENY!" dicamba volatility. SOC-7-8.

Monsanto argues its conduct was "on the low end" of reprehensibility. MONBr-60. Tell that to Bader Farms, whose multi-generational, family peach business was destroyed because Monsanto decided damaging farmers would be good for its own profitability. This confirms "strong medicine" is required to deter Monsanto from repeating this conduct.

Ratio. The District Court reduced the jury's punitive award from a 17:1 ratio to 4:1. BASFAddm-51. This satisfies due process.

a. The Court did not err by including the entire compensatory award in the ratio, when punitive damages were limited to the 2015-2016 claim. MONBr-61.

This Court recently rejected Monsanto's same argument in *Adeli v. Silverstar Auto., Inc.*, 960 F.3d 452, 461 (8th Cir. 2020), where the defendant argued the ratio should exclude incidental damages awarded for breach of express warranty because that claim disallows punitive damages. This Court disagreed, explaining the relevant ratio includes actual *and potential* harm reasonably likely to have occurred from defendant's conduct. *See id.* (citing *TXO Prod. Corp. v. All. Res. Corp.*, 509 U.S. 443, 460 (1993); *Pulla v. Amoco Oil Co.*, 72 F.3d 648, 659 (8th Cir. 1995)). Here, such harm

includes destruction of Plaintiff's peach operation; the jury concluded that did occur. DEFSAppx-847-848.

The jury did not apportion compensatory damages between 2015-2016 and 2017-present claims. *See id.* Bader Farms suffered an indivisible injury—year-after-year dicamba exposures to the same perennial trees, all causing or contributing to cause lost profits. In these circumstances, while the conduct supporting a punitive award can be limited to the 2015-2016 claim, the compensatory damages cannot. This Court has explained:

> An indivisible injury … is "incapable of any logical, reasonable, or practical division." …"Certain results, by their very nature, are obviously incapable of any logical, reasonable or practical division. Death is such a result, and so is a broken leg or any single wound, the destruction of a house by fire, or the sinking of a barge."

Mitchell v. Volkswagenwerk, AG, 669 F.2d 1199, 1203, n.2 (8th Cir. 1982) (citations omitted).

Here, Monsanto effectively sank the barge. Dicamba exposures to perennial trees in 2015-2016 caused lost profits in 2015-2016 and also combined with dicamba exposures in 2017-present to cause lost profits in 2017-present: the injury is incapable of division. It is irrelevant that some trees died in 2015-2016, while others did not succumb until 2017 or later. Trees that died in 2017-2018 did so, in part, due to 2015-2016 exposures.

SOC-9-11. This is why the verdict form did not apportion between the claims—and presumably why Defendants did not request an apportionment.

None of Monsanto's cited cases support arbitrarily dividing a single-sum compensatory award between two claims to assess a punitive-damage ratio. *See, e.g.*, *JCB*, 539 F.3d at 874; *Lompe v. Sunridge Partners, LLC*, 818 F.3d 1041, 1068 (10th Cir. 2016); *Clark v. Chrysler Corp.*, 436 F.3d 594, 607 n.16 (6th Cir. 2006); *Grabinski v. Blue Springs Ford Sales, Inc.*, 203 F.3d 1024, 1026 (8th Cir. 2000).

In *JCB*, there was no single-sum award; the *jury* awarded separate damages for each claim. *See id.* *Grabinski*, *Lompe*, and *Clark* all split damages between *parties*, not *claims*, based upon each party's responsible share. *See id.* Here, that would result in the same 4:1 ratio because Monsanto and BASF are jointly and severally liable for 100% of compensatory and punitive damages.

b. The 4:1 ratio satisfies due process. BASFAddm-51. "The Supreme Court has repeatedly intimated that a four-to-one ratio is likely to survive any due process challenges given the historic use of double, treble, and quadruple damages as a punitive remedy." *Wallace v. DTG Operations, Inc.*, 563 F.3d 357, 357 (8th Cir. 2009) (reducing punitive award from 16:1 to 4:1 ratio). "There exists a 'long legislative history, dating back over 700

years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish." BASFAddm-51 (quoting *Quigley v. Winter*, 598 F.3d 938, 955 (8th Cir. 2010) (reducing punitive award from 18:1 to 4:1 ratio)).

Monsanto does not deny significant authority supports the constitutionality of a 4:1 ratio. BASFAddm-49,51 (citing *Eden Elec., Ltd. v. Amana Co.*, 370 F.3d 824, 828-29 (8th Cir. 2004); *Wallace*, 563 F.3d at 357; *Quigley*, 598 F.3d at 955; and *Ondrisek v. Hoffman*, 698 F.3d 1020, 1030-31 (8th Cir. 2012)). Instead, Monsanto appoints itself jury, presumptively compares the unique facts and circumstances of these cases, and self-servingly concludes its conduct is not as bad. MONBr-64-65. The Supreme Court has rejected this "comparative approach" test:

> Because no two cases are truly identical, meaningful comparisons of such awards are difficult to make. ... [W]e are not prepared to enshrine petitioner's comparative approach in a "test" for assessing the constitutionality of punitive damages awards.

TXO Prod. Corp., 509 U.S. at 457–58 (citations omitted).

Nonetheless, Monsanto's comparisons are unhelpful. For example, although the court in *Boerner* reduced punitive damages to a 1:1 ratio, it noted "there is no evidence that anyone at American Tobacco intended to victimize its customers." *Boerner v. Brown & Williamson Tobacco Co.*, 394

F.3d 594, 603 (8th Cir. 2005). Conversely, here, Monsanto expected to damage farmers and used expected damage to sell more product.

Monsanto's attempts to distinguish multi-million-dollar cases approving a 4:1 ratio fail. Those cases confirm the ratio is constitutional here. For example, *Ondrisek* involved reprehensible physical abuse, and the Court reduced punitive damages to a 4:1 ratio. 698 F.3d at 1031. However, it explained, "Punitive damages of $12 million for each plaintiff [$24 million total] are sufficient to achieve proper punishment and [deterrence]." *Id.* The defendant in *Ondrisek* was incarcerated, unable to reoffend, and without apparent financial wealth. *See id.* at 1028. Conversely, Monsanto is a $7.8 billion company, still commercializing products. *Ondrisek* supports a *minimum* ratio of 4:1 here. And, while *Eden Elec.* included a reprehensible threat of physical harm, the damages were purely economic, yet the Court affirmed a $10-million punitive award, a 4.8:1 ratio, for fraud and breach of contract. 370 F.3d at 827.

Contrary to Monsanto's opinion of its own conduct, the District Court concluded it was sufficiently reprehensible to support the 4:1 ratio. Missouri law required the *jury* to determine the amount necessary to punish Monsanto and deter it and others from like conduct. PLAppx-285. Consequently, the District Court correctly refused to arbitrarily impose a 1:1

ratio just because damages are in the millions when, to do so, would negate any punishment and deterrent effect on Monsanto. BASFAddm-50 (A "1:1 ratio, however, does not appear to be sufficiently punitive for a $7.8 billion company like Monsanto."); *Quigley*, 598 F.3d at 956 (*increasing* district court's reduced punitive award from a 1.5:1 to 4:1 ratio, which "comports with due process, while achieving the statutory and regulatory goals of retribution and deterrence.").

Ample precedent supports constitutionality of a 4:1 ratio. The District Court, who viewed all the evidence, held "precedent requires" a reduction to $60 million—not less. BASFAddm-51.

No Comparable Penalty. Monsanto cannot invoke the Missouri Crop Protection Act ("MCPA") because it previously argued it has no application to perennial crops. PLAppx-2. The District Court agreed the MCPA does not remedy the conduct at issue or the injuries alleged in this case. DEFSAppx-121. Monsanto cannot contend the MCPA applies to limit its liability but does not apply to impose liability.

Plaintiff's peach business was destroyed—including the crippling of future profitability—which the MCPA does not redress. Mo. Rev. Stat. § 537.353. The "field crops" MCPA protects can be replanted each year: the punishment for damaging an annual crop is not remotely comparable to an

appropriate penalty for destroying Plaintiff's peach business. "There is no comparable civil penalty(.)" BASFAddm-49.

2. Monsanto's Net Worth Is Relevant.

Monsanto's net worth is relevant in assessing constitutionality of punitive damages. In *Trickey*, this Court approved the following rationale:

> The [punitive] award of $400,000 is less than one one-thousandth of [the employer's] approximately $500,000,000 net worth and the ratio of punitive to compensatory damages ... is less than 6:1, a ratio that in these circumstances does not set off any alarm bells.

705 F.3d at 804 (citing *Morse v. S. Union Co.*, 174 F.3d 917, 925 (8th Cir. 1999)).

This same net-worth analysis was applied and endorsed in *May*. 852 F.3d at 817 (citing *Morse* and *Trickey*) ("considering net worth of defendant as relevant to the [constitutional] analysis").

The District Court did not place "impermissible emphasis" on Monsanto's net worth. It simply refused to impose a lower ratio (when a 4:1 ratio comports with due process) because less would not be sufficiently punitive given Monsanto's net worth. BASFAddm-50.

V. BASF IS JOINTLY LIABLE FOR PUNITIVE DAMAGES.

A. Missouri Law Imposes Joint Liability.

"Under Missouri law, partners are vicariously liable for punitive damages based on acts of their copartners done in the course of partnership business." *Blanks*, 450 S.W.3d at 401–02; Mo. Rev. Stat. § 358.130. "This liability attaches even if partners did not participate in, ratify, or have knowledge of the activity giving rise to the award of punitive damages." *Id.* (citations omitted). Accordingly, "proof of individual culpability is not required." *Id.* at 402.

"[A]ll the partners [can] be held jointly liable for punitive damages, and a single sum verdict is warranted." *Blue v. Rose*, 786 F.2d 349, 352-53 (8th Cir. 1986)(applying Missouri law). Contrary to BASF's contention that *Blue* supports "separate findings of punitive damages in varying amounts against partners," (BASFBr-48) *Blue* actually held "this case does not support such a submission" because "the tortious acts were clearly performed within the scope of partnership authority and business. Thus, the single sum verdict and judgment as to punitive and compensatory damages was proper." *Id.* at 53.

"BASF and Monsanto worked to commercialize a dicamba-tolerant system at all times covered by the evidence," and "the punitive damages instruction was based on Monsanto's conduct in releasing the Xtend seed without a corresponding herbicide in 2015-2016, which was surely an act in

furtherance of the joint venture." BASFAddm-30. It was also within the joint venture authority, which delegated to Monsanto authority to commercialize Xtend seed. DEFSAppx-730, 1320.

BASF's invocation of Missouri's comparative fault statute, Mo. Rev. Stat. § 537.067, is misplaced. This is not a comparative fault case. BASF cites no case applying 537.067 to require individualized punitive damages assessments for joint venturers. Nonetheless, since "[n]either [Defendant] sought to allocate" under 537.067 "joint and several judgment" is "not erroneous." *Burg v. Dampier*, 346 S.W.3d 343, 360 (Mo. App. 2011).

The District Court's earlier dismissal of joint punitive liability—based upon Plaintiff's representation it would not object to a punitive-damage allocation—did not dismiss Plaintiff's joint venture claim, and it "did not address the impact of a joint venture finding" on joint punitive damages liability. BASFAddm-29. Ultimately, "Neither defendant submitted a jury instruction on allocation, nor did either defendant object to the verdict form's failure to include an allocation." BASFAddm-47.

BASF was not unfairly surprised or prejudiced by the District Court's clarification during trial that, should the jury find a joint venture, joint liability for punitive damages would attach under Missouri law. Indeed, BASF explained this to the jury during closing argument. DEFSAppx-842.

("When you are asked about '15 and '16 both from the punitive side and on the liability side, you will only see Monsanto's name there". . . "what the plaintiffs want you to do is find a conspiracy and joint venture because that means BASF shares Monsanto's losses.")

BASF could have sought to apportion punitive damages, objected to the instructions' lack of apportionment, objected to introduction of Monsanto's net worth, and requested to present argument during the punitive phase. BASF "failed to submit the tortfeasors' relative obligations to the trier of fact. It therefore waived this determination, and, with it, an allocation." *Schmidt v. Ramsey*, 860 F.3d 1038, 1052 (8th Cir. 2017); BASFAdd-29,47.

"To the extent BASF claims it was unable to defend against punitive damages as a result of the [earlier] dismissal, that is untrue." BASFAddm-29-30. "BASF mounted a vigorous defense to the joint venture claim, and thus its complaints now fall flat." BASFAddm-47.

B. <u>There Is No Federal Due Process Violation</u>.

BASF's cases cited for the proposition that "the federal Due Process Clause requires an individualized assessment of culpability" are inapposite because none address punitive damages assessed against joint venturers. BASFBr-42-43. BASF's punitive-damages liability derives not from its

individualized conduct but, rather, from Missouri joint venture law. There is no error.

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Respectfully submitted,

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Date: May 5, 2021

s/ Tracey F. George
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Counsel for Plaintiff-Appellee Bader Farms, Inc.

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on May 5, 2021, the foregoing Plaintiff-Appellee Bader Farms, Inc.'s Answer Brief was electronically filed with the Clerk of the Court using the CM/ECF system which sent notification of such filing to all counsel of record.

Date: May 5, 2021

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